OVERSEA-CHINESE BANKING CORP. LTD.

v.

NATIONAL UNION OF BANK EMPLOYEES & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[ORIGINATING MOTION NO. A16 OF 1984]
11 MAY 1984

LABOUR LAW: *Application for orders of certiorari and prohibition - Dispute submitted referred to Minister - Reference to Industrial Court - Whether submission and reference valid - Jurisdiction - Whether dispute a trade dispute.*

Wong Lee Sim was an employee of the applicant ("the Bank"). He was transferred from the Accounts Department to the Credit/Administration Department in the same office. The first respondent protested against the transfer. The dispute between the Bank and the Union was submitted to the second respondent ("the Minister"), who referred it to the third respondent ("the Industrial Court"). Contending that the dispute was not a trade dispute under the Industrial Relations Act ("the Act"), the Bank applied to the High Court (a) for leave to apply for an order of *certiorari* regarding the reference by the Minister and (b) for an order of prohibition against the Industrial Court on the ground that the Minister and the Industrial Court had acted without jurisdiction.

Held:
The prayer (a) was unnecessary and the prayer (b) was premature. The Industrial Court was seized with jurisdiction to hear the reference, and this included jurisdiction to hear and determine the question whether the dispute was a trade dispute. For the High Court to entertain the application would encourage duplicity of proceedings. *(Assunta Hospital v. Dr. A. Dutt* [1981] 1 MLJ 115*).*

Case referred to:
Assunta Hospital v. Dr. A. Dutt [1981] 1 MLJ 115

Legislation referred to:
Industrial Relations Act 1967, s. 26(2)

For the applicant - C.V. Das & Nagarajah; M/s. Shook Lin & Bok
For the 2nd & 3rd respondents - Mary Lim; Attorney-General's Chambers

JUDGMENT

Wan Hamzah J:

Wong Lee Sim is an employee of the Oversea-Chinese Banking Corporation Limited (the applicant) and was working as a book-keeper at the Kuala Lumpur Main Branch of the Bank. When carrying out yearly check in December 1983 the internal audit team of the Bank discovered discrepancies in the books maintained by Wong Lee Sim. The Bank asked him to explain the discrepancies and he gave his explanation in writing. Subsequently the Bank gave him a letter asking him to attend an inquiry and by the same letter the Bank transferred him out of the Accounts Department to the Credit/Administration Department in the same office. As a result the National Union of Bank Employees (the first respondent) sent to the Bank a letter protesting against the transfer and asking the Bank to rescind it. The dispute between

the Bank and the Union was eventually submitted to the Honourable the Minister of Labour (the second respondent). The Minister referred the dispute to the Industrial Court (the third respondent) for determination, purportedly under s. 26(2) of the Industrial Relations Act.

The Bank has been advised by its solicitors that the dispute between the Bank on the one hand and Wong Lee Sim and the Union on the other over the transfer is not a trade dispute under the Act. Therefore by the originating motion the Bank asks this Court-

(a) for leave to apply for an order of *certiorari* to remove into this Court for the purpose of its being quashed the order of reference of the Minister on the ground that the Minister had acted without jurisdiction, and

(b) for leave to apply for an order of prohibition to prohibit the Industrial Court from proceeding to hear and determine the dispute on the ground that the Industrial Court has no jurisdiction to do so.

On behalf of the Bank it was submitted that the Minister's order of reference purports to confer on the Industrial Court jurisdiction to determine the dispute, and if the order of reference is not quashed the Industrial Court is bound to determine the dispute. It was further submitted that if the Industrial Court determines the dispute and gives a decision against the Bank, it would be too late for the Bank to apply to the High Court to quash the decision of the Industrial Court. So the Bank posed to this Court the question whether the dispute is a trade dispute.

In my judgment this application should be dismissed on the ground that prayer (a) is unnecessary and prayer (b) is premature, and on the ground that to entertain this application would encourage duplicity of proceedings. Instead of making this application the Bank should at the hearing before the Industrial Court raise the question that the dispute is not a trade dispute, and should persuade the Industrial Court not to consider and determine it on that ground. The Industrial Court is bound to hear and determine the question posed and the objection raised against the determination of the dispute. If the Industrial Court dismisses the objection, that would be the right time for the Bank to come to this Court to apply for an order of prohibition to prevent the Industrial Court from determining the dispute; or if the Industrial Court proceeds to determine the dispute and gives no chance to the Bank to apply for an order of prohibition, it would be open to the Bank to apply for an order of *certiorari* to quash the decision of the Industrial Court on the ground that the dispute is not a trade dispute and the Industrial Court has no jurisdiction to determine it.

In the Federal Court case of *Assunta Hospital v. Dr. A. Dutt* [1981] 1 MLJ 115, the respondent claimed that he had been dismissed from employment by the appellant without just cause and excuse and eventually the matter was referred by the Minister to the Industrial Court. The appellant applied to the High Court for an order of prohibition to prevent the Chairman of the Industrial Court from hearing the case. One of the grounds of the application was that the respondent was not a workman under the Industrial Relations Act 1967. The High Court dismissed the application. The appellant appealed to the Federal Court and the Federal Court dismissed the appeal and up held the decision of the High Court. The important point in that case was that if it was found that the respondent was not a workman, then the Industrial Court would not have jurisdiction to hear and determine the dispute. So, when the application for an order of prohibition was made the question was posed to the High Court whether the respondent was or was not a workman. The Federal Court was not concerned with what was the answer to the question posed, but the Federal Court left the matter to the Industrial Court to find the answer. The judgment of the Federal Court, *inter alia*, reads:

> The question whether Dr. Dutt was a workman within the definition in the Act so as to avail himself of the provisions thereof, in our view and with respect, is a mixed question of fact and law and clearly within the province of the Chairman (of the Industrial Court) to find in a reference to him of the workman's representations of dismissal without just cause or excuse ... Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seized with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction. Failure to do so may well result in an order for *mandamus* . . . there can be, on a proper construction of this section, no doubt whatsoever that it would be a dereliction of duty to renounce the jurisdiction to hear reference. In the exercise of its jurisdiction in a reference under s. 20(3), **the Court (i.e. the Industrial Court) has a duty to come to a first finding whether the claimant was or was not a workman** within the definition of a workman in the Act, and secondly whether or not the workman has been dismissed without just cause or excuse...

I would like to stress on the words which I underline: "the Court (i.e. the Industrial Court) had a duty to come to a first finding whether the Claimant was or was not a workman", in order to show that the Industrial Court is not only competent but also bound to consider the very question posed to the High Court in that case and to make a finding and give an answer to it. Similarly in the present case the Industrial Court is competent to consider the question posed to this Court whether the dispute is a trade dispute and to give an answer to it. The fact that the reference in that case was made under s. 20(3) and the reference in the present case was made purportedly under s. 26(2) should not make any difference in the result.

It should be noted that the Federal Court was careful to use the words "jurisdiction to hear the case" and "jurisdiction to hear the reference" when referring to the jurisdiction which the Industrial Court was seized with. In the judgment of the Federal Court it is not mentioned that once reference is made by the Minister the Industrial Court is seized with power to determine the dispute. I believe the significance of this is that when the Industrial Court is seized with jurisdiction to hear the reference, it is competent to hear and determine a question which relates to its power to determine the dispute, for example the question of whether the respondent in that case was a workman, and if it was found by the Industrial Court that he was not a workman it should decide that it had no power to entertain the respondent's claim for reinstatement in employment. So in the present case the Industrial Court is seized with jurisdiction to hear the reference, which includes jurisdiction to hear and determine the question whether the dispute is a trade dispute. If it decides that the dispute is a trade dispute, the Industrial Court should then proceed to hear and determine it. If it finds that the dispute is not a trade dispute, the Industrial Court should report to the Minister that it has no power to determine it.

Since the Industrial Court is competent to decide on the question whether or not the dispute is a trade dispute, it is not necessary for the applicant to apply to quash the Minister's reference. The submission that the dispute is not a trade dispute can be made on behalf of the Bank in the Industrial Court instead of in this Court. For this Court to entertain such application would encourage duplicity of proceedings. I am aware of the following passage in the judgment of the Federal Court:

> In the case under consideration we are not concerned with any question whether the Minister has not exercised his discretion correctly. If it should be such a case, the action is not to stop the Industrial Court from hearing the reference but by some application by which the order of reference can be impugned.

In that case there was no application for an order to set aside the Minister's reference, and therefore it cannot be expected that the Federal Court at the time of considering that case had in its mind all the pros and cons of granting such order, e.g. the question of duplicity of proceedings. If the Federal Court had to consider the question relating to such order, it would no doubt take into consideration all relevant matters and would not favour duplicity of proceedings.

It is premature for the Bank to apply for an order to prohibit the Industrial Court from determining the dispute, because before proceeding to determine the dispute the Industrial Court should make the first finding whether the dispute is a trade dispute. In the event that the Industrial Court decided to proceed with the hearing of the dispute as a trade dispute, that would be the right time for the Bank to apply to this Court for an order of prohibition. To entertain the application for an order of prohibition at this stage would encourage duplicity of proceedings. The Bank should exhaust all efforts in the Industrial Court before coming to the High Court, in order to avoid duplicity of proceedings.

The application is dismissed. It appears from the further affidavit filed on behalf of the applicant that the applicant and the first respondent had appeared before the Industrial Court and the Industrial Court had fixed the case for mention pending the outcome of the present application in this Court. This judgment should serve as a direction to the Industrial Court to proceed to hear and determine the question whether the dispute is a trade dispute.

Also found at [1984] 2 CLJ 186